IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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BRIEF FOR THE RESPONDENTS.

STATEMENT OF THE CASE.

The relevant facts of the case are fully and accurately stated in the Memorandum Opinion of the District Court at A1-A4 in the Appendix to this Brief.

Petitioners' presentation of the facts is misleading because it makes the District Court's finding of bad faith due process

violations appear unwarranted. Petitioner school principals represent that their only wrongdoing consisted of an "innocent error of judgment" in causing a "presumed" and "momentary" violation of Respondents' civil rights. Petitioners' Br. p. 18. The District Court, however, found, to the contrary, that Petitioners' suspensions of Respondents for twenty school days without basic procedural safeguards required by due process of law were sufficiently obvious violations of Respondents' civil rights that Petitioners should have known they were acting unconstitutionally and were therefore liable for damages pursuant to the standards set forth in *Wood* v. *Strickland*, 420 U. S. 308 (1975).

Petitioners now apparently take issue with this holding, enigmatically characterizing it as "a retroactive finding of a violation based upon a requirement of foreseeability." Petitioners' Br. p. 8. However, Petitioners did not cross-appeal from the District Court's holding. They did not challenge it in their brief to the Seventh Circuit, 545 F. 2d 30 at 31 n. 1, and they did not raise it as an issue in their Petition for Certiorari. The procedural posture of this case thus provides no basis for disputing the District Court's holding that Petitioners were guilty of full-fledged bad faith violations of constitutional rights.

Petitioners also try to minimize the seriousness of their due process violations by misstating the heretofore unchallenged findings of fact of the District Court. Petitioners state that Respondents "acknowledged participating in the prohibited activity," Petitioners' Br. p. 8, which in the case of Piphus is said to be "smoking cigarettes," Petitioners' Br. p. 5, and in the case of Brisco, wearing an earring said to denote gang membership, Petitioners' Br. pp. 3-4. However, Piphus was suspended not for smoking a cigarette, but for smoking marijuana. Memo. Opinion A4. Although Piphus consistently denied having smoked this substance, Memo. Opinion A4, he was suspended without being allowed any opportunity to explain what he had been doing or to present exculpatory evidence, such as the cigarette

which he had discarded before he had been accused of smoking marijuana.

Although Respondent Brisco was indeed suspended for wearing an earring which allegedly denoted gang membership, Petitioners fail to mention that Brisco denied that his earring denoted such membership, but maintained instead that it was a symbol of black pride. Petitioners' Br. pp. 3-4, Memo. Opinion A3. Nevertheless, Brisco was not given any opportunity to contest his suspension by showing that his conduct did not present a threat of material disruption to the school and was therefore within the scope of First Amendment protection. Memo. Opinion A3, 8. Given the severity of the twenty-day suspensions, the District Court found that the principals should have known their failure to provide "any adjudicatory hearing of any type would violate the constitutional rights of plaintiffs." Memo. Opinion A10. Thus, rather than being "presumed" and "momentary," the constitutional violations in this case were clear cut and presented serious threats to the Respondents' educational opportunities.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1988 of Title 42 of the United States Code:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Rule 52(a) of the Federal Rules of Civil Procedure (in pertinent part):

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Section 34-18.1 of Chapter 122 of the Illinois Revised Statutes (in pertinent part):

> The board of education shall insure or indemnify and protect the board, any member of the board or any agent, employee, teacher, student teacher, officer or member of the supervisory staff of the school district against financial loss and expense, including reasonable legal fees and costs arising out of any claim, demand, suit, or judgment by reason of . . . alleged violation of civil rights . . . provided such board member, agent, employee, teacher, student teacher, officer or member of the supervisory staff, at the time of the occurrence was acting under the direction of the board within the course or scope of his duties.

SUMMARY OF ARGUMENT.

In enacting the predecessor to 42 U. S. C. § 1983 Congress intended to provide a private damage remedy for the *per se* violation of constitutional rights. The Congressional debates make clear that injury was deemed inherent in the deprivation of constitutional rights and that the damage remedy was intended to fulfill the dual purpose of providing compensation for such injury and deterring officials from violating constitutional rights in the future. The Congressional debates and the language of 42 U. S. C. § 1988, on its face and as interpreted by the Court, reveal that it was also Congress' intent that the courts use the most effective remedies available for accomplishing the Act's purpose of protecting persons in their civil rights. To make an award of compensatory damages for bad faith constitutional violations contingent upon affirmative proof of consequential injuries would defeat this intent first, by disregarding contrary precedent providing more effective protection for civil rights and second, by giving officials immunity from judicial redress for their bad faith constitutional violations not resulting in provable consequential injuries.

United States Supreme Court precedent, supported by precedent of English and American state courts, is clear that an award of damages is the most appropriate remedy for the harm inherent in the deprivation of the constitutional right to vote.

Petitioners' argument would require that the Court either reject these precedents or choose which constitutional rights as a matter of law have or do not have inherent value. This task is both without warrant in the language of the Constitution and contrary to the changing needs of society. If, however, such a choice is to be made among constitutional rights, due process of law must be deemed to have *per se* value because Congress intended that this specific constitutional right be given judicial protection under Section 1 of the Ku Klux Act of 1871. Moreover, analysis of the Court's opinions reveals that violation of procedural due process of law inevitably results in causing the plaintiff actual harm in four respects. First, it denies the opportunity to plead one's case to the original decision-maker on judgmental, discretionary or compassionate grounds. Second, it provokes feelings of frustration and hostility in the individual who has been treated arbitrarily. Third, it destroys the individual's sense of security in the right to possess and enjoy his own property free of arbitrary governmental interference. Finally, it is a cause of the deprivation of an interest in liberty or property. Although the loss of liberty or property may not always be subject to affirmative proof and may result from factors in addition to the denial of due process, it is nevertheless always present when due process is denied and always subject to amelioration by due process safeguards.

Petitioners' argument that no harm is inherent in the violation not only of procedural due process, but of *any* constitutional right would have the effect of affording judicial redress for the deprivation of often insignificant interests collaterally protected by the Bill of Rights, but no redress for the deprivation of citizens' paramount interest in the exercise of the Rights themselves. Such an approach renders purely rhetorical the Court's many decisions stating that constitutional rights protected against state infringement by the due process clause of the Fourteenth Amendment are essential to safeguard fundamental liberties of American citizenship.

Petitioners' proposed rule of no inherent injury in the bad faith violation of constitutional rights, besides disregarding precedent, would undermine effective judicial enforcement of civil rights. It is likely to be seen by some officials as an invitation to violate procedural due process because the time and bother an official would save by ignoring due process would not be counterbalanced by an award of damages in cases where the only significant harm is in the denial of the right itself. Petitioners' theory would also provide no redress for, nor deterrence against, bad faith due process violations where the consequential injuries would likely have occurred even if due process safeguards had been afforded. The Seventh Circuit's approach in giving the wrongdoing plaintiff damages only for the harm actually suffered by the deprivation of the right itself is a reasonable compromise between the extremes of Petitioners' and *Amicus'* denial of all damages and the Fourth and Fifth Circuits' award of consequential damages regardless of plaintiff's wrongdoing.

There are no alternative remedies to that of compensatory damages for the harm inherent in bad faith constitutional violations which can provide adequate redress for or deterrence against such violations. An award of nominal damages trivializes the significance of the right, does not compensate for the harm actually suffered because of the deprivation of the right itself and offers no deterrence against further bad faith constitutional violations. Compensatory damages for the harm inherent in bad faith violations of constitutional rights also has the advantage of limiting the need for federal courts to enforce compliance with constitutional rights through assuming the on-going direction of the affairs of citizens, state courts and administrative agencies.

Even if harm were not to be deemed inherent in the bad faith violation of Respondents' constitutional rights, the reversal of the District Court's denial of all damages should be upheld because that denial was based on an erroneous legal standard. In

requiring Respondents to provide affirmative evidence to quantify their injuries, the District Court applied the damage rule appropriate for breach of contract cases, rather than the rule appropriate for cases where the injuries are non-pecuniary in nature and concern such intangible interests as reputation, peace of mind, dignity, privacy and liberty. In such cases damages are awarded without proof of the extent of the harm since the harm is inferred from the circumstances of the violation. Since violations of constitutional rights in general and procedural due process in particular commonly result in such intangible harms it was reversible error for the District Court to deny Respondents damages because of their failure to quantify the extent of their injuries.

ARGUMENT.

I. The Intent of Congress in Providing a Private Damage Remedy Under Section 1 of the Ku Klux Act of 1871 Was to Afford Effective Judicial Redress for and Deterrence Against Deprivations of Constitutional Rights Regardless of Whether Consequential Injuries Could Be Proven to Have Resulted from the Deprivations.

Petitioners and *Amicus* argue that 42 U. S. C. § 1983 does not provide a compensatory damage remedy for the bad faith violation of constitutional rights in the absence of proof of injury consequential to the violation. This argument is based on the premise that Congress in enacting Section 1 of the Ku Klux Act of 1871, the predecessor to § 1983, intended to exclude from its remedial purposes the redress of constitutional rights when consequential injuries cannot be proven. Mr. Justice Harlan in his concurring opinion in *Monroe* v. *Pape*, 365 U. S. 167 (1961), recognized that such was not the intent of Congress and that to so construe it would nullify the essential purposes of the Act. Noting that the tone of the legislative history is "one of overflowing protection of constitutional rights," 365 U. S. at 196, Justice Harlan concluded that the statute becomes no more than

a jurisdictional provision unless "one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." 365 U. S. at 196.

Justice Harlan thought this view of the legislative intent was also supported by common sense, for otherwise, victims of state power relegated to state remedies will often receive relief that "will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right." 365 U. S. at 196 n. 5. In support of this point, Justice Harlan gave several examples of cases, similar to the instant case, in which there would be little or no relief if the plaintiff had to prove under state tort law the consequential losses resulting from the constitutional violation:

> "There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." 365 U. S. at 196 n. 5.

Justice Harlan's perception that the 1871 Act was intended to provide compensation for the deprivation of the constitutional right itself regardless of proof of consequential injuries is amply supported by the Act's legislative history. Proponents and opponents of the bill made clear for differing reasons their views that the damage action available under Section 1 was intended as a remedy for injuries done to the rights of citizens and not simply for the tangible losses which might flow from the violation of those rights. Representative Sheldon, in support of the bill, stated:

> "It seems to me to be sufficient, and at the same time to be proper, to make a permanent law affording to every citizen a remedy in the United States courts for *injuries to him in those rights* declared and guaranteed by the Constitution . . ." Cong. Globe, 42d Cong., 1st Sess., 368 (1871) (emphasis supplied).

Representative Kerr, an opponent of the bill, stated:

> "This section gives to any person who may have been *injured in any of his rights*, privileges, or immunities of person or property, a civil action for damages against the wrong doer in the Federal courts." Cong. Globe, 42d Cong., 1st Sess., App. 50 (1871) (emphasis supplied).

Finally, the Congressional intent to make damages available for the infringement of civil rights and not just for the injuries consequent upon such infringement is reflected in Senator Frelinghuysen's statement that under the civil remedies section "the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights." Cong. Globe, 42d Cong., 1st Sess., 501 (1871).

That the Congressmen should stress Section One's role in remedying injuries done to the rights themselves is not surprising since the sole purpose of the bill, officially titled "An Act to Enforce the Provisions of the Fourteenth Amendment," was to deter the deprivation of civil rights.[1] The bill's principal sponsor in the

1. Petitioners erroneously state that the purpose of Section 1 of the Ku Klux Act of 1871 was to provide "some form of civil remedy to redress acts of racial discrimination." Petitioners' Br. p. 10. As this Court noted in *Monroe* v. *Pape*, 365 U. S. 167, 178 (1960), the supporters of the bill were concerned about "the discrimination against Union sympathizers and Negroes in the actual enforcement of the laws." Indeed, the Act's supporters were explicit in their intent to protect the rights of all citizens:

> "This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also *to all people* where,

(Footnote continued on next page.)

House, Representative Shellabarger, made explicit the link between Section One's civil remedy and the need to enforce the Fourteenth Amendment's provision for the protection of rights:

> "The section being in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of state laws which abridge these rights, it goes directly to the enforcement of that provision which says the State shall not make or enforce any law which shall abridge any privileges or franchises of citizens." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

In supporting the defeated Sherman Amendment to the 1871 Ku Klux Act, which would have made the inhabitants of a county, city or parish liable for damages for certain types of property destruction or violence, Representative Smith of New York made clear that the civil damages to be available under Section 1 were for the purpose of suppressing the violations being perpetrated in the South:

> "[Supporters of the bill have agreed] . . . that Congress has the power to suppress these alleged outrages in the South, that Congress has the power to make the perpetrators liable to a civil action for damages. Now, sir, if Congress has that power—the power under the Constitution to suppress these outrages—I submit that Congress has the incidental power to adopt any means which will be conducive to the end desired to be gained, to wit, the suppression of these outrages." Cong. Globe, 42d Cong., 1st Sess., 799 (1871).

Indeed, Representative McHenry, an opponent of the bill, described the civil remedy provided by Section 1 not as a compensatory or remedial measure, but as an unjustified exercise of power by Congress "[t]o enforce upon the citizen a punishment or penalty for the wrong and delinquency of a State." Cong. Globe, 42d Cong., 1st Sess., 429 (1871).

(Footnote continued from preceding page.)

> under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship."

Speech of Representative Shellabarger, Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871) (emphasis supplied).

As Representative Hawley, a proponent of the bill, observed, failure to provide effective protection for the rights guaranteed by the Constitution would render those rights worthless:

> "It [the Constitution] has no value if it will not protect me or any other citizen in the enjoyment of the rights which, under the Constitution, are pretended to be guaranteed to citizens everywhere." Cong. Globe, 42d Cong., 1st Sess., 382.

Given the legislative history of Section 1, the statement of *Amicus* that "neither the supporters nor the opponents of the legislation contemplated the possibility of an award of damages not based on actual injury," Brief of National School Boards Assoc., p. 26 (hereafter *Amicus* Brief), is at once irrelevant and misleading. The injuries for which Congress intended to provide relief were the "actual" ones inherent in the deprivation of civil rights and an action for damages was seen as one of the remedies that would provide the needed relief and the needed deterrence. The Congressional dissent that did occur over the passage of Section 1 concerned both the wisdom of affording any federal remedy for the violation of civil rights and the scope of the rights to come under that remedy. It was these issues which Senator Thurman was addressing in the passage quoted by *Amicus*, *Amicus* Br. p. 25, rather than the appropriateness of an award of nominal damages under Section 1.

Amicus' use of Senator Thurman's statement out of its context in the debates is a perfect illustration of why the Court has "often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents." *Labor Board* v. *Fruit Packers*, 377 U. S. 58, 66 (1964). When read in context, it becomes clear that Senator Thurman's fear of civil rights suits being brought under the Act for trivial damages grew out of his belief that the first section of the bill would have "the centralizing tendency of transferring all mere private suits, as well as the punishment of offenses, from the State into the Federal

courts." Cong. Globe, 42d Cong., 1st Sess., App. 216.[2] Senator Thurman's expansive construction and trivialization of the rights to be protected by the bill did not reflect the views of the bill's proponents.[3]

The question now at issue before the Court of whether the first section of the Act was intended to authorize compensatory damages solely for the deprivation of constitutional rights was not addressed by Senator Thurman. However, another opponent of the bill, Representative Arthur, believed it was so intended. He stated that the bill would authorize "heavy damages" against officials who innocently erred in carrying out their duties and who are sued by "any knave, plain or colored, under the pretext of the deprivation of his rights, privileges, and immunities as a citizen, *par excellence*, of the United States . . ." Cong. Globe, 42d Cong., 1st Sess. 365.

Petitioners' contention that the Act of 1871 did not contemplate the award of damages solely for the deprivation of constitutional rights not only ignores the words of the legislators in debating the Act, it also disregards settled principles of statutory construction, which the Court has applied specifically to the 1871 Act. The Ku Klux Act of 1871 is the paradigm of a remedial statute intended to cure defects in the common law. *Monroe* v. *Pape*, 365 U. S. at 173-4. The traditional rule for the judicial interpretation of remedial statutes is that the statute "should be construed liberally to carry out the wise and salutory purposes of its enactment." *Stewart* v. *Kahn*, 78 U. S. (11 Wall.)

2. In order to stress the trivial nature of the rights he feared would be brought under the protection of the Act, Senator Thurman illustrated its potential consequences with the example of a federal prosecution of two Negroes for stealing a white man's hens because, under Section 2 of the bill, they formed a combination to deprive the hen-owner of his rights of property. Cong. Globe, 42d Cong., 1st Sess., App. 219.

3. Twelve years after the Act's passage Senator Thurman's construction of the bill was held by the Court not to have been the construction intended by Congress in passing the Act. *Civil Rights Cases*, 109 U. S. 3, 17 (1883).

493, 504 (1870); *Tcherpnin* v. *Knight*, 389 U. S. 332, 336 (1967).

That Congress intended the Court to construe the 1871 Act in a remedial, result-oriented fashion was made clear by the Act's sponsor, Representative Shellabarger:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all people." Cong. Globe, 42d Cong., 1st Sess., App. 68.

The explicit terms of 42 U. S. C. § 1988 (1976) are the strongest evidence that Congress intended the courts to apply the most effective available remedies for carrying out the object of the Act, which § 1988 defined as being "for the protection of all persons in the United States in their civil rights and for their vindication." In *Sullivan* v. *Little Hunting Park*, 396 U. S. 229, 240 (1969), the Court stated that the choice of the rule of damages to be applied under 28 U. S. C. § 1343(4) is to be governed by § 1988's policy requiring use of the most effective remedy:

> "This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier* v. *Cherry*, 293 F. 2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired."

This policy of choosing the most effective available remedies for the protection of civil rights received its most recent legislative affirmation in the Senate Committee Report for the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, which stated:

> "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." S. Rpt. No. 94-1011, 94th Cong., 2nd Sess., pt v, 3 (1976).

In sum, it was and is the intent of Congress that the rule of damages in civil rights cases under 42 U. S. C. § 1983 is to be that rule which most effectively carries out the goals of compensating for and deterring violations of civil rights. The rule for which Petitioners contend, which would deny any compensatory damages to the plaintiff who can prove no injury other than that inherent in the bad faith violation of his constitutional right itself, is not the most effective rule available for achieving the goals of § 1983. As discussed below, it would first disregard established common law precedent awarding compensatory damages for the harm inherent in the violation of constitutional and other personal rights and second, it would undermine the Congressional intent both that citizens be compensated for the deprivation of their civil rights and that officials be deterred from violating those rights.

II. The Common Law Has Long Provided a General Compensatory Damage Remedy for the Intangible Harms Inherent in the Violation of Certain Types of Personal Rights.

There is no dispute in this case that under the common law compensatory damages can be awarded only for actual losses. The bad faith deprivation of Respondents' constitutional right to due process of law, however, inflicted an actual loss. In maintaining that Respondents suffered no more than a technical violation of right with no attendant loss of anything of value, Petitioners and *Amicus* ignore or discount long-settled English and American common law precedent.

Decisions dating back to the *Magna Carta Cases*,[4] establish the common law rule that damages are the appropriate remedy for the intangible injuries that inevitably result from the violation of an individual's legally protected interests in personal

4. During the eighteenth century the English courts, in a series of cases since dubbed "The Magna Carta Cases" (Washington, *Damages in Contract at Common Law*, 47 LAW Q. REV. 345, 363 (1931)), upheld the right of a citizen to collect damages for a violation of his civil rights where the only injury was the deprivation of a right. In these cases the courts explicitly recognized that compensation must be given for an injury to a right and that money damages were a necessary deterrent to future violations.

In the leading case of *Ashby* v. *White*, 2 Ld. Raym. 938, 3 *id.* 320 (1703), the trial court awarded damages of 200 *l* where the only injury to plaintiff was a violation of his right to vote. Though the judgment of the trial court was arrested by the King's Bench, Lord Holt dissenting, the House of Lords reinstated the trial court's verdict, adopting the opinion of Lord Holt that the deprivation of a civil right imports an injury compensable in money damages even though that injury is difficult to prove. Equally stressed by Lord Holt was the deterrent aspect of a damage remedy, for "to allow this action will make public officers more careful to observe the constitution of cities and boroughs." 2 Ld. Raym. at 956.

The defendant in *Huckle* v. *Money*, 2 Wils. 205 (1763), moved for a new trial on the ground that damages of 300 *l* were excessive where the defendant, acting under a general warrant issued by the Secretary of State, detained the plaintiff for several hours, but "used him very civilly by treating him with beef steaks and beer," 2 *id.* at 205, thus inflicting scant injury. The court denied the motion because "the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at trial; they saw a magistrate over all the King's subjects exercising arbitrary power, violating *Magna Charta* and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant before them; . . . to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition, a law under which no *Englishman* would wish to live an hour; . . . I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages." 2 *id.* at 206-207.

Similarly, in *Beardmore* v. *Carrington*, 2 Wils. 244 (1764), the court upheld an award of 1000 *l* damages where plaintiff's home had been searched and plaintiff arrested by defendants acting under

(Footnote continued on next page.)

security, liberty, dignity and the exercise of the essential rights of citizenship. Courts have long recognized in these cases that the extent of the loss is not subject to any type of objective quantification and that if there is to be any remedy at all, damages must be presumed from the fact of the wrongdoing. McCormick, *Handbook on the Law of Damages*, 53 (1935); Dobbs, *Handbook on the Law of Remedies*, 528-531 (1973). The most widely cited authority for this principle is *Ashby* v. *White*, *supra* p. 16 n. 4, in which Chief Justice Holt stated, in response to the objection that plaintiff suffered no hurt from the violation of his right to vote:

> ". .. but surely every injury imports a damage though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary but an injury imports a damage, when a man is thereby hindered of his right." 2 Ld. Rymd, at 955.

Chief Justice Holt's conclusion as to the damages inherent in the violation of a citizen's right to vote has been accepted by American courts without dissent. Although state courts in the

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a general warrant. The court noted that in cases involving a person's liberty damages are not readily quantified:

> "[C]an any body say that a guinea *per diem* is sufficient damages in this extraordinary case, which concerns the liberty of every one of the King's subjects; we cannot say the damages of 1000 *l* are enormous; . . ." 2 *id.* at 250.

In *Wilkes* v. *Wood*, Lofft 1 (1763), and *Redshaw* v. *Brook*, 2 Wils. 405 (1769), plaintiffs were awarded 1000 *l* and 200 *l* respectively where defendants, acting under general warrants, had entered and searched the plaintiffs' homes. Though the defendants in both cases "did very little damage and behaved well enough" 2 Wils. at 405, the courts found such damage awards justified in light of the need to compensate plaintiffs for the violation of their rights and "to deter [government agents] from any such proceedings for the future." Lofft at 19.

In passing Section 1 of the Ku Klux Act of 1871 Congress acted in full awareness of this English common law background and especially of the rights which grew out of *Magna Carta* (see speech of Representative Hoar, Cong. Globe, 42d Cong., 1st Sess., 332-333).

nineteenth century differed over whether election officials' liability for damages, depended on proof of improper motive, they never questioned that damages were the proper form of remedy for the illegal denial of the right to vote. See, Annotation, *Personal Liability of Public Officer for Breach of Duty in Respect of Election or Primary Election Laws*, 153 A. L. R. 109, 115 (1944). The rationale for the damage remedy in voting rights cases was set forth with the greatest clarity by Chief Justice Parker in *Lincoln* v. *Hapgood*, 11 Mass, 350, 354 (1814):

> "[T]he right of voting in such a government as ours, is a valuable right; it is secured by the constitution; it cannot be infringed without producing an injury to the party; and although the injury is not of a nature to be effectually repaired by a pecuniary compensation, yet there is no other indemnity which can be had. In such a case, as in the case of an injury to the reputation and sometimes to the feelings, the good of society, and, security against a repetition of the wrong, require that the suffering party should be permitted to resort to this mode of relief.
>
> . . . .
>
> "Upon the whole, we see no better way, than to leave cases of this kind to the jury, under the direction of the Court; nor have we any doubt that a correct public sentiment will apply the remedy in each case, proportionately to the offense; so that, on one hand, a man who has been without any fault of his own, deprived of a valuable privilege, should find indemnity and protection in the laws; and on the other, that men who are in places of public trust, should not be subject to too severe a penalty, for an involuntary failure in a proper performance of their duty."

The right to recover damages solely for the violation of the citizen's constitutional right to vote has also been repeatedly recognized by the federal courts. Most frequently cited in this regard is *Nixon* v. *Herndon*, 273 U. S. 536 (1927), which reversed the dismissal of a complaint alleging $5,000 in damages for the unconstitutional denial of plaintiff's right to vote in a primary election. Citing *Ashby* v. *White* and prior decisions of this Court, Mr. Justice Holmes stated:

> "[T]hat private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years . . . and has been recognized by this court." 273 U. S. at 540.

The fact that *Nixon* did not determine the actual amount of damages to be awarded for the violation of the right to vote does not diminish the opinion's significance as an affirmance of the principle that damages are an appropriate remedy where there is no deprivation alleged other than the violation of the constitutional right.

Mr. Justice Holmes recognized in *Giles* v. *Harris*, 189 U. S. 475 (1903), that damages are a uniquely appropriate remedy for the violation of certain political rights, such as the right to vote. The Court in that case refused to order election officials to enroll plaintiffs on the voting lists on the grounds that such equitable relief was not contemplated by § 1979 Rev. Stats., the predecessor of 42 U. S. C. § 1983. However, the Court pointed out that "[t]he deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money," 189 U. S. at 485, but that "apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." 189 U. S. at 488.

The advantage of the damage remedy over injunctive relief in cases involving political rights was also emphasized by Justice Frankfurter in *Colegrove* v. *Green*, 328 U. S. 549, 552 (1946) and *Coleman* v. *Miller*, 307 U. S. 433, 469 (1939). In the latter case, Justice Frankfurter viewed the scope of relief available for voting rights violations as determined solely by the availability of the damage remedy:

> " 'Private damages' is the clue to the famous ruling in *Ashby* v. *White*, supra, and determines its scope as well as that of cases in this Court of which it is the justification. The judg-

ment of Lord Holt is permeated with the conception that a voter's franchise is a personal right, assessable in money damages, of which the exact amount is 'peculiarly appropriate for the determination of a jury', see *Wiley* v. *Sinkler*, 179 U.S. 58, 65, and for which there is no remedy outside the law courts." 307 U. S. at 469.

The relevance of the damage principles articulated in the Court's voting rights cases has not been confined to the area of voting. In *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 396 (1971), the Court recognized that its voting cases are authority for the proposition that damages are an appropriate remedy generally for violations of rights protecting liberty interests:

> "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Nixon* v. *Herndon*, 273 U.S. 536 540 (1937); *Swafford* v. *Templeton*, 185 U.S. 487 (1902); *Wiley* v. *Sinkler*, 179 U.S. 58 (1900) . . . "

The principle recognized in the Court's voting rights cases of awarding compensatory damages for the harm inherent in the deprivation of constitutional rights has been applied by lower federal courts with respect to a variety of constitutional rights. In *Tatum* v. *Morton*, No. 76-1187 (decided August 10, 1977 and, as yet unreported) the United States Court of Appeals for the District of Columbia reversed the district court's limitation of damages to $100. per plaintiff for the violation of their First Amendment right to demonstrate peacefully outside the White House. The Court of Appeals found that the district court's reasons for limiting damages—the favorable publicity the plaintiffs' unlawful arrests caused and plaintiffs' failure to mitigate damages by posting bond to secure release from custody—did not give sufficient importance to the value of the exercise of the First Amendment right itself:

> "The right to demonstrate is a significant strand of the cluster of First Amendment rights. The vindication of these

> rights warrants more than token acknowledgment . . . . Compensatory damages embrace more than recompense for monetary injury, however, as is evident from amounts for pain, suffering and humiliation. Compensation for denial of First Amendment rights should not be extravagant, say to the point of awarding the equivalent of what would be a year's, or even six month's compensation for the average person. Correspondingly such a compensation award should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right to demonstrate. The district court's 'limited' approach cannot stand." Slip Opinion, pp. 6-7.

In *Magnett* v. *Pelletier*, 488 F. 2d 33 (1973), the First Circuit reversed and remanded the district court's award of $500 damages for an unlawful search as inconsistent with the finding that nominal damages were warranted. The Court of Appeals stated, contrary to the interpretation of its decision urged by *Amicus*, *Amicus* Br. p. 27:

> "This is not to say that in a civil rights action a plaintiff who proves *only an intangible loss of civil rights* or purely mental suffering may not be awarded substantial compensatory damages." 488 F. 2d at 35 (emphasis supplied).

The district court was directed to decide whether nominal damages or $500 general compensatory damages were warranted.

In *Manfredonia* v. *Barry*, 401 F. Supp. 762 (E. D. N. Y. 1975), defendant police officers were found liable for damages for unlawful arrests. Although plaintiffs failed to show any consequential injury resulting from their arrests, the court awarded $3500 compensatory damages and $500 punitive damages to each plaintiff, stating that:

> "[S]uch familiar elements of damage, however, need not be shown in order to justify a reasonably substantial compensatory award in a civil rights case. (cite omitted) It is sufficient to establish, as plaintiffs have succeeded in doing here, a deprivation of constitutional rights through misuse of official power." 401 F. Supp. at 770.

In *Sexton* v. *Gibbs*, 327 F. Supp. 134 (N. D. Tex. 1970), *aff'd* 446 F. 2d 904 (5th Cir. 1971), although plaintiff did not claim or prove "actual damages of any specific amount," the court awarded $500.00 and $250.00 for a Fourth Amendment violation stating: "However, there is no doubt that Plaintiff suffered humiliation, embarrassment and discomfort in addition to being deprived of his federally protected rights as set forth above." 327 F. Supp. at 143.

The Seventh Circuit's rule of damages for violations of civil rights was explicitly adopted by the district court in *Bruce* v. *Board of Regents of N. W. Mo. State Univ.*, 414 F. Supp. 559, 568-569 (W. D. Mo. 1976), where defendants had failed to provide plaintiff with a due process hearing in an attempt to rescind his sabbatical leave contract. In *United States ex rel. Neal* v. *Wolfe*, 346 F. Supp. 569 (E. D. Pa. 1972), plaintiff was placed in prison segregation without a prior hearing. The court awarded $25 for each day in segregation plus damages of $114.60 for actual injuries since plaintiff was entitled "to recover damages against state officials for violation of his constitutional rights." 346 F. Supp. at 576.

In *Rhoads* v. *Horvat*, 270 F. Supp. 307 (D. Colo. 1967), the court found that the unlawful arrest of plaintiff entitled him to compensatory damages of up to $5,000 even though no evidence of consequential injuries was shown. The court recognized that "it is open to the jury in a case such as this to make a determination as to the amount that plaintiff is entitled to be awarded for the deprivation." 270 F. Supp. at 310.

Amicus argues that the federal courts have not traditionally awarded general compensatory damages for constitutional violations without affirmative proof of actual injuries. *Amicus* Br., pp. 16-23. However, six of the eight cases cited by *Amicus* do not discuss or in any way concern the issue of whether damages may be awarded for the violation of constitutional rights without proof of consequential injuries. The two cited cases which are relevant to this question. *Smith* v. *Losee*, 485 F. 2d 334 (10th

Cir. 1973) *(en banc), cert. denied* 417 U. S. 908 (1974), and *Stolberg* v. *Members of Board of Trustees for State Colleges of Connecticut*, 474 F. 2d 485 (2nd Cir. 1973), although they do not specifically address the issue decided by the Seventh Circuit, do deny damages for due process violations because plaintiffs failed to sustain the burden of proving the actual injuries which they claimed.

More recent cases indicate, however, that both the Tenth and Second Circuits no longer require affirmative proof of consequential injuries in order to award compensatory damages for the violation of constitutional rights. In *Unified School District No. 480* v. *Epperson*, 551 F. 2d 254 (10th Cir. 1977), the Tenth Circuit found that a terminated teacher's due process rights had been violated and remanded the case for the purpose of assessing damages. The court stated that the Seventh Circuit's decision in *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F. 2d 569 (1975), *cert. denied* 425 U. S. 963 (1976), which awarded damages for the harm inherent in the violation of constitutional rights, sets forth the proper rule of damages in such cases. Such a rule, the court said, was necessary to make the constitutional right meaningful:

> "To reach a contrary result in the instant case would to us be a bit incongruous, in that we would be holding that there was no relief or remedy whatsoever for an admitted violation of a constitutional right. The right to notice and a hearing before termination or nonrenewal of a teaching contract, assuming the particular individual enjoys such a right, is an important one, and to hold that such a right may be violated without affording the injured party any redress of any kind tends to deprive the right of meaning." 551 F. 2d at 260-261.

In *United States ex. rel. Larkins* v. *Oswald*, 510 F. 2d 583 (2d Cir. 1975), the plaintiff-prisoner was not given a due process hearing before being placed in segregation for twelve days, which was longer than prison regulations permitted. In affirming the $1,000 compensatory damage award as not ex-

cessive, the court cited no affirmative evidence as to the injury suffered, but inferred the emotional and dignatory harm from the circumstances of the violation. The unduly long confinement the court said "undoubtedly must have created an anguish and anxiety or fear of indefinite confinement to segregation, matters for which he was entitled to be justly compensated." 510 F. 2d at 590. The court noted the difficulty of assessing the psychological impact of the solitary confinement and said the matter was for the jury's determination: "Particularly in a civil rights case the amount of damages is a question for the jury's determination. *Basista* v. *Weir*, 340 F. 2d at 88, *quoting from Wayne* v. *Venable*, 260 F. 64, 66 (8th Cir. 1919)." 510 F. 2d at 589.

Wayne v. *Venable*, a leading voting rights case, best summarizes the approach of the common law towards granting relief for the deprivation of a personal right protected by the Constitution:

> "In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. *Scott* v. *Donald*, 165 U.S. 89, 17 Sup. Ct. 265, 41 L. Ed. 632; *Wiley* v. *Sinkler*, 179 U.S. 58, 65, 21 Sup. Ct. 17, 45 L. Ed. 845." 260 F. at 66.[5]

5. *Amicus* would dismiss the Eighth Circuit's decision in *Wayne* on the grounds that it incorrectly cites the Court's decision in *Wiley* v. *Sinkler*, 179 U. S. 58 (1900) and *Scott* v. *Donald*, 165 U. S. 58 (1897). *Amicus* Br., pp. 31-33. These two cases, however, do support the proposition for which *Wayne* cited them. The Court in *Wiley* explicitely rejected the district court's rationale for dismissing the complaint on the grounds that a verdict of $2,000 for the violation of voting rights would be excessive and therefore did not meet the jurisdictional amount. The Court stated, to the contrary, that in an action for damages based on a violation of civil rights, the "amount of damage the plaintiff shall recover in such an action is

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III. Harm Is Inherent in the Deprivation of Procedural Due Process of Law.

As shown above, the Court has established that deprivation of the constitutional right to vote will entitle plaintiff to damages without proof of injury other than the deprivation itself. Acceptance of Petitioners' argument that no compensable harm is inherent in the violation of due process of law thus would require the Court to determine as a matter of law which constitutional rights have inherent compensable value and which do not. Since various constitutional rights have been perceived to have different degrees of relative social and personal importance at different stages in the country's history, it is crucial that the determination of their relative value to those who suffer from their deprivation be made by the trier of fact in the context of the circumstances of the individual case. The Court's acceptance of Petitioners' invitation to classify as a matter of law certain constitutional rights as having no inherent value would have no basis in the language of the Constitution and would tend to make the Bill of Rights into a static document affording no opportunity for development to meet changing social conditions.

Assuming, however, that a choice had to be made between constitutional rights which as a matter of law have and do not have inherent compensable value, Petitioners' selection of due process as having no such value would, along with equal protec-

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peculiarly appropriate for the determination of the jury." 179 U. S. at 65. The Court in *Nixon* v. *Herndon*, 273 U. S. 536 (1927) cited *Wiley* for the same proposition for which it was relied upon in *Wayne* v. *Venable*.

The Court in *Scott* v. *Donald*, 165 U. S. 58 (1897), did, as *Amicus* points out, hold that exemplary damages may be awarded for the malicious violation of "personal rights and privileges secured to the plaintiff by the Constitution of the United States." However, in reaching that conclusion the Court also recognized that the *per se* violation of Constitutional rights is also the proper subject of an award of regular compensatory damages in that such a violation constitutes "injury not the subject of compensation by a *mere* money standard." 165 U. S. at 89 (emphasis supplied).

tion of the law, be the least justifiable choice. The very title of the 1871 Act, "An Act to Enforce the Provisions of the Fourteenth Amendment," as well as the Congressional debates, make clear that due process of law was intended to be one of the rights to be afforded specific protection under the Act. Thus, a holding that due process of law is not one of the constitutional rights the *per se* violation of which causes sufficient harm to qualify for redress under § 1983 would be the opposite of what Congress intended.

Even without reference to legislative intent, it is clear from the Court's opinions that there is substantial harm inherent in the violation of due process of law. Petitioners and *Amicus* portray this right as a technical requirement having marginal significance for school children[6] and society, e.g. Petitioners' Br. p. 18, *Amicus* Br. p. 46. The Court, however, has repeatedly taken the contrary view: that procedural due process is more than a formality unrelated to immediate, concrete and deeply felt interests of the individual.

Mr. Justice Stewart has pointed out with respect to the constitutional right to be heard:

> "The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantially unfair or mistaken deprivations of property . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference." *Fuentes* v. *Shevin*, 407 U. S. 67, 80-81 (1972).

6. The amount of litigation spawned by public school educators in order to establish their right to procedural due process of law when their own jobs are at stake makes it doubtful whether most educators would agree that the violation of this constitutional right is a mere "technicality" were their own jobs to be terminated with the same peremptory abruptness with which Petitioners terminated Respondents' right to attend school.

Mr. Justice Frankfurter made clear that procedural due process is concerned not with the technicalities of process, but with its effects on protecting the individual's profound interest in just treatment at the hands of the government:

> "But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess." *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U. S. 123, 162 (1951) (Frankfurter, J. concurring.)

The precise nature and extent of the harm an individual suffers when he is deprived of procedural due process of law depend upon the circumstances of each case. However, the case law does reveal that the harm inherent in the violation of due process has four distinct elements. First is the loss of the individual's opportunity to convince the government before it acts against him that its proposed actions are unwarranted. After the government has acted against the individual he may have judicial review of the factual accuracy of the administrative determination; but the court cannot substitute itself for the administrator in the discretionary or judgmental areas of decision-making, such as policy formulation, experimentation and risk-taking or the exercise of trust and mercy based on individual circumstances. *Skehan* v. *Board of Trustees of Bloomburg State Col.*, 501 F. 2d 31, 40 (3rd Cir. 1974) *vacated on other grounds*, 421 U. S. 983 (1975); *Morrissey* v. *Brewer*, 408 U. S. 471, 479-480 (1972).

If the individual cannot plead his case on discretionary, judgmental or compassionate grounds before the administrator has

taken a position against him and can therefore present his side only in the narrow hearing affordable by judicial review for questions of adjudicative fact, he has lost a major opportunity for the protection of his liberty or property interests. Had Respondent Piphus been suspended for smoking cigarettes, as Petitioners maintain, Petitioners' Br. p. 5, rather than for smoking marijuana, as the District Court found, Memo. Opinion A4, this opportunity to plead to the administrator's sense of fairness and professional judgment would have become of far greater importance than the opportunity to show that he did not commit the offense charged. If Piphus had been able to use such opportunity to present the school principal, or preferably an official other than his accuser, with evidence that smoking cigarettes where the principal caught him was commonly done, that all other school personnel overlooked such conduct, that no student had been suspended for smoking cigarettes there before, and that a twenty-day suspension was the penalty reserved for the most serious breaches of school discipline, the school official may well have decided that a month long suspension would be overly harsh. Indeed, the fact that after Piphus had served eight days of his suspension the District Superintendent reviewed the situation and decided to reduce its length from twenty to five days, Memo. Opinion A4, demonstrates that had Piphus been given an opportunity to present his side of the story, even the principal may well have come to the same considered conclusion as his superior: that anything longer than a five-day suspension would be too harsh.

It can never be known, of course, after a due process violation has occurred what, if anything, the exercise of such an opportunity to plead one's cause on judgmental or discretionary grounds would have availed. The denial of that opportunity, however, constitutes an unmistakable loss to the plaintiff, which, although uncertain in extent, is certain in fact and therefore subject to monetary compensation. *Palmer* v. *Connecticut Ry. Co.*, 311 U. S. 544, 561 (1941); *Wachtel* v. *National Alfalfa Journal Co.*, 190 Ia. 1293, 176 N. W. 801, 805 (1920).

A second source of the harm inherent in the violation of due process is in the inevitable reactions of hostility and indignation which are provoked in the individual when he is not accorded basic fairness by the government Cf. *Morrissey* v. *Brewer*, 408 U. S. 471, 484 (1971); *In Re Gault*, 387 U. S. 1, 26 (1967). "The feeling . . . that justice has been done," which Justice Frankfurter found "so important to a popular government," *Joint Anti-Fascist Refuge Committee* v. *McGrath*, 341 U. S. 123, 172 (1951), is equally important to sustain the sense of individual dignity and equality under the law which the Fourteenth Amendment was intended to guarantee to all citizens. The affront to personal dignity that naturally arises when the individual is rendered helpless to challenge the government's taking of his interests in property or liberty comprehends the feelings of humiliation, distress and outrage which are traditionally awarded as general damages for dignatory torts. Cf. Dobbs, *Handbook on the Law of Remedies*, 139, 531 (1973).

A third source of harm inherent in the violation of procedural due process arises from the fact that the individual who becomes the focus of lawless official action loses the assurance that the government affords all of its citizens a degree of security for their basic liberty and property interests. Maintaining security in the possession of one's property is one of the oldest and most valued functions of our legal system, as the Court noted in *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972):

> "[I]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

When the individual is deprived of property without due process of law he can no longer rely on the assurance found in the common law and the Constitution that he may enjoy what he believes is his, free of arbitrary governmental interference. *Fuentes* v. *Shevin*, 407 U. S. 67, 81 (1971). *Fuentes* makes clear that this loss of security in one's entitlements is inherent in the deprivation of due process; that the arbitrary taking itself is an element of damage separate from the value of the property taken:

> "At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." 407 U. S. at 81-82.

Indeed, if this were not the case, and the denial of prior notice and hearing before a deprivation of entitlement resulted only in a loss that could be fully compensated by a post-deprivation compensation for the wrongfully taken entitlement, then the Court has indicated that the deprivation would not constitute a violation of due process. *Ingraham* v. *Wright*, ... U. S. ....., 97 S. Ct. 1401, 1416 and dissenting opinion of Stevens, J., at 1428 (1977).

A final type of harm inherent in the violation of procedural due process is found in the actual liberty or property interests which are lost because of the arbitrary governmental action. These losses can usually be classified as consequential injuries which are subject to affirmative proof, such as the monetary value of personal property arbitrarily seized, the loss of freedom from an arbitrary probation revocation or, as in the instant case, the value of the educational services missed because of the arbitrary suspensions. These consequential injuries are not inherent in the nature of the violation and their extent, if any, depends entirely on the facts of the individual case.[7] However, where there is a violation of due process, but the consequential injuries are not subject to affirmative proof, the violation, contrary to Petitioners' contention, still subjects the plaintiff to harm. Indeed, it could not be otherwise for a prerequisite for the judicial finding of a due process violation is the deprivation of a significant interest which could have been protected by the provision of proce-

7. The Seventh Circuit's reversal of the District Court's denial of damages for plaintiff's consequential injuries in the face of affirmative proof of their extent was not presented to the Court as an issue on certiorari.

dural safeguards. For example, the student who is expelled without a hearing from public school, but who loses no education because he immediately attends a tuition-free private school of equivalent or higher caliber, in all likelihood cannot prove that he suffered any consequential educational injury from the suspension. Nevertheless, there is no doubt that the expulsion itself necessarily caused intangible harm in the opportunity foreclosed, the stigma imposed and the indignity suffered. While these intangible injuries may in certain cases be subject to affirmative proof, under common law damage principles they need not be so proved in order to be compensable where they are the ordinary consequence of the violation. McCormick, *Handbook on the Law of Damages*, 54 (1935).

In sum, Petitioners' and *Amicus'* argument that there is no harm caused by the violation of procedural due process in the absence of affirmative proof of consequential injuries first, ignores the deprivation of the liberty or property interests without which there could be no due process violation and second, ignores the several harms which flow directly from government officials' bad faith failure to observe basic standards of fairness when they deprive people of their liberty and property interests.

IV. Petitioners' Argument That There Is No Harm Inherent in the Violation of Any Constitutional Right Protected Against State Infringement by the Fourteenth Amendment Denies the Essential Role Which Courts Have Given the Bill of Rights in Safeguarding Important Personal Liberties.

Petitioners' and *Amicus'* argument that there is no harm caused by the violation of *any* constitutional right in the absence of proof of consequential injuries, Petitioners' Br. p. 16, *Amicus* Br. p. 22, ignores not only the clear precedent of the voting rights cases, but also the very harms the Bill of Rights was intended to prevent. In so doing, Petitioners and *Amicus* would have the courts find value in the sometimes insignificant collateral consequences of the violations of constitutional rights, but no value

in the exercise of the rights themselves. Hypothetical First, Fourth, Fifth and Sixth Amendment violations will illustrate the serious implications of this inversion of values.

If a school official had seized and destroyed Respondent Brisco's earring, instead of suspending him for wearing it, and if the District Court had subsequently held that the school official should have known that Brisco was correct in maintaining that his wearing the earring was a symbol of black pride that would not materially disrupt the operation of the school, this finding of a bad faith First Amendment violation would entitle Brisco, according to Petitioners' and *Amicus*' theory, to recover for the value of the destroyed earring, but not for the value of his right to express symbolically his ethnic pride. Similarly, an Orthodox Jewish prisoner whose First Amendment right to freedom of religion is violated by prison authorities who in bad faith destroyed his ritual skullcap and prayer shawl would, according to Petitioners' and *Amicus*' theory, be entitled by proof of this violation to compensation for the value of the clothing, but not for the value of his constitutional right to follow the dictates of his religion.

In a similar fashion Petitioners' and *Amicus*' theory turns the Fourth and Fifth Amendments on their heads by valuing collateral consequences of the rights, but not the rights themselves. A law enforcement official breaks into a citizen's home undetected, secretly photocopies his personal diary and introduces the diary in evidence at a trial, at which the citizen is convicted, although not on the basis of information in the diary. According to Petitioners' and *Amicus*' theory, the citizen would be entitled to compensation for proven physical damage to his property or for personal embarrassment, but not for the deprivation of the primary interest intended to be protected by the Fourth Amendment—personal security in one's home and private possessions. Furthermore, because the violation of the citizen's privilege against self-incrimination did not directly cause his conviction, according to the theory propounded by *Amicus*, *Amicus* Br.

p. 17, the citizen would be entitled to no compensation whatever for the violation of this Fifth Amendment right since there would be neither consequential nor inherent harm in that violation.

In discussing the significance for the United States Constitution of Lord Camden's judgment in *Entick* v. *Carrington and Three Other King's Messengers*, 19 Howell's State Trials 1030 (1765), Justice Bradly in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), exposes the fallacy of Petitioners' and *Amicus*' theory of no inherent harm in the violation of the Fourth and Fifth Amendments:

> "[I]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

A final illustration of how Petitioners' and *Amicus*' theory eviscerates the meaning of constitutional safeguards is that of a sheriff who, believing a citizen is guilty of murder, locks him up for the minimum five-year murder sentence, but does not first bother with affording the citizen the "technical" rights of a trial. If it is subsequently determined that the citizen indeed committed the murder and would have been sentenced to at least five years in jail had he been afforded a trial, Petitioners' and *Amicus*' theory compels the conclusion that no redress would be available for the violation of the citizen's rights guaranteed by the Sixth Amendment. Mr. Justice Black's statement that "it is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal," *In Re Oliver*,

333 U. S. 257, 278 (1948), is thus rendered mere verbiage under Petitioners' theory that constitutional rights can have no inherent value of their own.[8]

Petitioners' "no inherent value" theory of constitutional rights depends upon acceptance of the proposition that the deprivation of a constitutional right is a purely technical violation, like walking across someone's grass. In this respect it is an expression of profound cynicism towards the seriousness of the Court's many opinions expressing the value of the due process clause of the Fourteenth Amendment in maintaining certain minimal standards which are "of the very essence of a scheme of ordered liberty. . ." *Adamson* v. *California*, 332 U. S. 46, 65 (1947) (Frankfurter, J. concurring, quoting from *Palko* v. *Connecticut*,

8. Additional examples of other types of constitutional violations where the real injuries if not deemed inherent in the wrong, are not likely to be compensated at all, are set forth in Justice Harlan's concurrence in *Monroe*, *supra* p. 9, and in the following comments of Professors Yudof and Black:

> "In constitutional adjudications, as in life itself, we rarely can know the specific and long-term consequences of a discrimination. The injury, of necessity, can be described only with reference to the resource discrimination itself—fewer street lights, less experienced teachers, lack of a transcript. It is virtually impossible to determine the long-term impact that absolute or relative denial will have on a person's life. If the class discriminated against has the burden of demonstrating some ultimate harm beyond the discrimination itself, it will rarely if ever succeed in constitutional litigation. The courts have wisely concluded that in the absence of a rational or compelling justification, those who engage in the discrimination must bear the burden of demonstrating its harmlessness." Yudof, *Equal Education Opportunity and the Courts*, 51 Tex. L. Rev. 411, 484 (1973).
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> "To have a confession beaten out of one might in some particular case be the beginning of a new and better life. To be subjected to a racially differentiated curfew might be the best thing in the world for some individual boy. A man might ten years later go back to thank the policeman who made him get off the platform and stop making a fool of himself. Religious persecution proverbially strengthens faith. We do not ordinarily go that far, or look so narrowly into the matter." Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L. J. 421, 428 (1960).

302 U. S. 319, 325 (1937). See for example, *Holden* v. *Hardy*, 169 U. S. 366, 389-390 (1898); *Powell* v. *Alabama*, 287 U. S. 45, 67 (1932); *Duncan* v. *Louisiana*, 391 U. S. 145, 148-149 (1968); *Schneider* v. *State*, 308 U. S. 147, 161 (1939). The consistency with which the court over the last century has affirmed the role of the Fourteenth Amendment in incorporating the protection of "those fundamental rights which belong to citizenship," *In re Kemmler*, 136 U. S. 436, 448 (1890), compels the conclusion that the Court was not merely exercising rhetoric in these opinions, but rather, was acknowledging the substantial value to the individual and to society of the Fourteenth Amendment's guarantee of due process of law. If this conclusion is true, then Petitioners' argument that the deprivation of due process of law guaranteed by the Fourteenth Amendment is not an actual loss cannot be true.

V. Denial of Damages for the Harm Inherent in the Bad Faith Deprivation of Constitutional Rights Would Undermine Congressional Policy in Favor of the Most Effective Judicial Enforcement of the Civil Rights Laws.

A. To Deny Plaintiffs Whose Due Process Rights Have Been Violated Any Damages Because They Cannot Prove Either the Extent of Their Consequential Injuries or That Consequential Injuries Resulted Solely from the Denial of Due Process Would Contradict Congressional Intent That § 1983 Provide Incentives Both for Citizens to Vindicate Their Constitutional Rights and for Officials to Respect Those Rights.

Denial of damages for bad faith violations of constitutional rights to plaintiffs who cannot prove their consequential injuries with reasonable certainty leaves citizens without a remedy for what, as noted above, can be the most serious possible violations of constitutional rights. It also provides no deterrence against future bad faith violations in direct contravention of the goals of Congress in enacting Section 1 of the 1871 Act. For example, a school superintendent who takes a narrow cost-benefit ap-

proach towards the management of his schools, upon realizing that the time and bother required of his staff to afford due process to students will not be counterbalanced by any off-setting court imposed sanctions, may well decide that not to require his staff to afford due process in discipline is the most rational, cost-effective approach. Cf. Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official,* 49 S. Cal. L. R. 1322, 1378-1379 (1976). The denial of all damages by the District Court below, despite its finding of a bad faith constitutional violation, can only be seen by school officials who share this management perspective as an invitation to ignore the bother of procedural due process. It was clearly not the intent of Congress in enacting the 1871 Act that government officials should be able to decide whether or not to violate constitutional rights free of any concern for the consequences of federal civil damage suits.

In addition to plaintiffs who cannot affirmatively prove consequential injuries from the violation of their rights, a second class of plaintiffs who would be denied any remedy for bad faith constitutional violations under Petitioners' and *Amicus'* theory are those who have been deprived of a property or liberty interest without procedural due process of law, but who would likely have been so deprived had they been afforded due process in the first place. According to the theory of both *Amicus, Amicus* Br. pp. 17-18, and the Seventh Circuit unless the plaintiff can establish causation—that but for the due process violation the deprivation of property or liberty would not have occurred—he cannot recover for the consequential injuries resulting from that violation.[9] *Hostrop* v. *Bd. of Jr. College Dist., No.*

9. As noted in the *Amicus* brief, pp. 17-18, n.6, an analogous situation was recently before the Court in *Mt. Healthy School District* v. *Doyle,* ..... U. S. ....., 97 S. Ct. 568 (1977). In that case an order of reinstatement and back-pay for a teacher who had been dismissed partly as a result of First Amendment conduct was reversed by the Court on the grounds that such relief would not be warranted if the school had valid not uncon-

(Footnote continued on next page.)

515, 523 F. 2d 569, 579-580 (7th Cir. 1975), *cert. denied,* 425 U. S. 963 (1976); *Piphus* v. *Carey,* 545 F. 2d 30, 32 (7th Cir. 1976). When this rule as to consequential damages is coupled with the Petitioners' and *Amicus'* theory denying damages for the violation itself, then the probably guilty plaintiff has no legal grounds to complain of his due process violation. It is as if the violation did not occur. Thus, the school administrator who is confident that, if sued, he can show that the plaintiff in fact violated a school rule need not bother with the formality of a hearing before expelling the student, just as a sheriff need not bother with the formality of a trial before locking up the person he knows he can show to be a heinous culprit.

With regard to the wrongdoing plaintiff whose procedural due process rights are violated, the Seventh Circuit has adopted a middle position between that advocated by Petitioners and *Amicus,* who would deny such plaintiff all damages under any circumstances, and that adopted by the Fourth and Fifth Circuits, which would award damages for the injuries consequential to the violation, even though the plaintiff would have suffered those injuries had due process been granted. *Zimmerer* v. *Spencer,* 485 F. 2d 176, 179 (5th Cir. 1973); *Horton* v. *Orange County Board of Education,* 464 F. 2d 536, 538 (4th Cir. 1972). The Fourth and Fifth Circuits' approach has much to

(Footnote continued from preceding page.)

stitutional grounds for dismissing the teacher. Although *Amicus* correctly perceives that the *Mt. Healthy* facts present what would be an appropriate situation for the award of general damages for the violation of the constitutional right itself, *Amicus* contends that the Court's failure *sua sponte* to suggest such an award of general damages demonstrates the Court's belief that such an award is not warranted. *Amicus* Br. pp. 17-18, n.6. The opinion in *Mt. Healthy,* however, in no way reveals that the Court either had such a conclusion in mind or would have reached such a conclusion had the issue been presented to it. What the facts of *Mt. Healthy* do illustrate, however, is how simple it would be under Petitioners' and *Amicus'* theory for a state official to avoid any accountability for unconstitutional discharges by asserting in court any of the countless constitutionally permissable grounds that can always be found in retrospect to justify a discharge.

recommend it. It can never be determined with complete confidence that a fair prior administrative hearing would have availed the plaintiff nothing and the risk of loss from a procedurally improper erroneous determination should in fairness be borne by the party who created that risk. Such an approach towards allocating the risk of loss from due process violations would also have a drastic deterrent effect upon officials faced with the prospect of extensive consequential damages for every bad faith violation of constitutional rights.

Nevertheless, the Seventh Circuit's approach of awarding the wrongdoing plaintiff only those damages which are found to be inherent in the violation of his rights appears more justified in terms of traditional common law principles of causation and damages. It provides an incentive for citizens to vindicate their constitutional rights and for officials to respect those rights while it avoids the danger of a windfall by measuring the damages according to the harm actually suffered by the deprivation of the right. Regardless, however, of which of the Circuits' approaches is more in accord with the Congressional policy of effective judicial enforcement of civil rights laws and common law remedial principles, both Congressional intent and common law principles would be violated by Petitioners' and *Amicus'* approach of denying the wrongdoing plaintiff all damages for the bad faith deprivation of his constitutional rights.

B. Petitioners' and Amicus' Argument That General Compensatory Damages for the Harm Inherent in the Violation of Constitutional Rights Are Unnecessary for Effective Enforcement of the Civil Rights Laws Because There Are Already Sufficient Incentives to Sue Is Untenable.

Petitioners and *Amicus* maintain that their approach to the problem of awarding damages for constitutional violations would not be adverse to the admitted Congressional policy of effective enforcement of the civil rights laws because there are already enough incentives for plaintiffs to sue without awarding damages

for the deprivation of the rights themselves. Petitioners' Br. pp. 17-18; *Amicus* Br. pp. 37-42. First, they maintain that the potential for an award of attorney's fees under 42 U. S. C. Section 1988 (1976) is sufficient incentive for the plaintiff to sue for the violation of his civil rights. Petitioners' Br. p. 17; *Amicus* Br. pp. 39-40. The possibility of collecting fees for plaintiff's attorney may remove one of the disincentives to suit. However, there is no logical basis for concluding that a plaintiff who has little prospect for monetary recovery for himself because of Petitioners' proposed rule on damages would sue in order for his attorney to recover fees. Indeed, for some plaintiffs the attorney's fees provision may be a positive disincentive to sue because of the possibility of having to pay a prevailing defendant's attorney's fees.

Second, Petitioners and *Amicus* assert that the possibility of collecting punitive damages is sufficient incentive for suits to vindicate civil rights. Petitioners' Br. pp. 16-17, *Amicus* Br. p. 39. However, in *Wood* v. *Strickland*, 420 U. S. 308 (1975), the Court specifically rejected the requirement that plaintiffs prove actual malice by defendants in order to recover damages. Such a standard "would deny much of the promise of Section 1983," and would constitute "an unwarranted burden in light of the value which civil rights have in our legal system." 420 U. S. at 322. The possibility of punitive damages is thus clearly not in itself an incentive to sue sufficient to satisfy the past and present Congressional intent that the Court encourage private civil rights enforcement.

Only brief comment is required for the remaining arguments of Petitioner and *Amicus* that existing remedies for the violations of constitutional rights are adequate in the absence of general damages for the violations themselves. First, Petitioners' belief that the availability of nominal damages "to recognize the invasion of the right" supports his argument against the need for general damages for that invasion, Petitioners' Br. p. 18, is pure fancy. Except in very limited situations, no rational plain-

tiff will sue to recover nominal damages. As courts and commentators have recognized, an award of nominal damages alone is tantamount to a ruling for defendant, except where it is intended to prevent a claim for adverse possession. McCormick, *Handbook on the Law of Damages*, 95-96 (1935), *Kulm* v. *Coast-to-Coast Stores Central Organization*, 248 Ore. 436, 443, 432 P. 2d 1006, 1009 (1967).

Second, *Amicus* argues that the award of compensatory damages for out-of-pocket, emotional and dignatory losses arising out of violations of civil rights under § 1983 provides an adequate incentive to sue. *Amicus'* Br. pp. 38-39. The point is well-taken but inconsistent with *Amicus'* major premise that general compensatory damages should be denied for the violation of the right itself; for, in cases where special or consequential injuries resulting from the violation cannot be proved with reasonable certainty, the crucial incentive of compensatory damages would be meaningless. Only by recognizing that some degree of actual harm is inherent in the bad faith violation of constitutional rights can compensatory damages become an effective incentive to sue for the vindication of such rights under all circumstances, rather than solely when consequential injuries happen to be subject to reasonably certain proof.

Finally, in an attempt to reopen the basic issue decided in *Wood* v. *Strickland* and *Monroe* v. *Pape*, *Amicus* maintains that the following non-damage remedies render an award of damages for the harm inherent in the violation of constitutional rights unnecessary for the protection of those rights: injunctive and declaratory relief, criminal prosecution under 18 U. S. C. Section 242 (1948), the concern of school administrators for their reputations and the concern of school board members with the "probability that a pattern of constitutional violations will adversely affect the likelihood of their reelection or re-appointment to office." *Amicus* Br. pp. 39-41. All of these factors clearly have a role in deterring future violations of students' constitutional rights. However, the legislative history

of the 1871 Act and the Court's interpretation of that history in *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961), leave no doubt that the existence of other possible prophylactic remedies for constitutional violations was not intended to substitute for the availability of the private damage remedy in an action at law. Only damages can provide not only the student, but any citizen, with compensation and meaningful vindication when there has been a bad faith violation of his constitutional rights.

C. The Availability of General Compensatory Damages for the Harm Inherent in the Violation of Constitutional Rights Limits the Need for Ongoing Federal Judicial Intervention in State Governmental Functions.

Not only tradition supports the role of money damages as the "normal and preferred remedy in our courts" and not only tradition justifies restricting injunctive relief to situations where there is no adequate remedy at law. McCormick, *Handbook on the Law of Damages* 1 (1935). The reluctance of the judiciary to mandate the future course of conduct to be followed by citizens and by other branches of government arises out of a prudential concern for the courts' limited powers of mandatory enforcement, for the drastic nature of the one such power they do have, contempt of court, and for their dependence in a democracy on the continued willingness of the citizenry to support the one branch of government that is not formally accountable for its decisions to the will of the majority. Developments *In the Law-Injunctions*, 78 Harv. L. Rev. 994, 1004-1007 (1965); *United States* v. *Richardson*, 418 U. S. 166, 179, 188-191 (1974). This reluctance is even greater where reasons of comity caution the federal court against intruding into the operations of state government. *Rizzo* v. *Goode*, 423 U. S. 362, 380 (1976).

A judgment for damages is the only remedy for the violation of constitutional rights which presents a realistic alternative to what the Court has increasingly considered to be an undesirable on-going intrusive presence of federal courts in the lives of

citizens and in the affairs of state government. *Rizzo* v. *Goode*, 423 U. S. 362, 380 (1976); *O'Shea* v. *Littleton*, 414 U. S. 488, 500-502 (1974); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 600-601 (1975). Naturally, there are constitutional, statutory and common law violations which demand affirmative relief and for which an award of damages alone would be a weak and unacceptable substitute. *e.g. Milliken* v. *Bradley*, ____ U. S. ____, 97 S. Ct. 2749 (1977). For many types of constitutional, statutory and common law violations, however, the choice between the two remedies requires that their relative merits be weighed in terms of both their effectiveness in achieving the goals of the law and their implications for the proper role of the judicial branch of government. Cf. *Allee* v. *Medrano*, 416 U. S. 802 (1974) (majority and dissenting opinions); *Decker* v. *North Idaho College*, 552 F. 2d 872, 875 (9th Cir. 1977); *Burton* v. *Cascade School Dist. Union High School, No. 5*, 512 F. 2d 850, 853 (4th Cir.), *cert. denied* 423 U. S. 839 (1975); *McKee* v. *Breier*, 417 F. Supp. 189, 191 (E. D. Wis. 1976); *Long* v. *District of Columbia*, 152 U. S. App. D. C. 187, 192, 469 F. 2d 927, 932 (D. C. Cir. 1972), *Boomer* v. *Atlantic Cement Co.*, 26 N. Y. 2d 219, 309 N. Y. S. 2d 312, 257 N. E. 2d 870 (1970). Acceptance of Petitioners' contention that compensatory damages are not an available remedy for the harm inherent in the violation of constitutional rights will inevitably result in courts' placing more reliance on broad injunctive decrees as the only remedy available for effectuating the policy of the civil rights laws.

In situations where there is a pattern of constitutional rights violations by agents of government, but the pattern is not of the magnitude required under *Rizzo* v. *Goode* for an injunction against the permissiveness of the supervisory authorities, the unavailability of a damage remedy for the individual constitutional violations themselves will force trial courts to stand passively by until the pattern of constitutional violations does satisfy the *Rizzo* standard for sweeping injunctive relief. Indeed, one federal district court faced with a situation in which a pattern of bad faith

police violations of constitutional rights had been proved, but injunctive relief was unavailable under *Rizzo*, tried *sua sponte* to award general compensatory damages for the proven individual constitutional violations, even though damages had not been requested or theretofore been an issue in the case. *Lewis* v. *Hyland*, 554 F. 2d 93, 101 (3rd Cir. 1977).

Injunctive relief is not the only form of on-going federal court intervention in state affairs which can be avoided or lessened by the availability of an effective damage remedy for the violation of constitutional rights themselves. From *Wolf* v. *Colorado*, 338 U. S. 25 (1949) to *Mapp* v. *Ohio*, 367 U. S. 643 (1961), to Chief Justice Burger's dissenting opinion in *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 415 (1970), it is clear that the question of the constitutional necessity of the exclusionary rule revolves around the availability of an alternative effective sanction against the unlawful gathering of evidence by law enforcement officers. While it cannot be predicted whether a clear promulgation by the Court of the permissability of awarding damages under Section 1983 for the harm inherent in the violation of constitutional rights would in the near future justify abandoning the exclusionary rule, such a recognition by the Court would in itself reduce the need for the use of the rule by putting police officials on notice that their negligent or knowing violations of constitutional rights are in themselves sufficient grounds for an award of damages.

Since the time of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *Wolf* v. *Colorado*, 338 U. S. 25 (1949), the Court has found the need for progressively expanding federal court intervention in the conduct of state governmental affairs in order to protect the constitutional rights of citizens. *Baker* v. *Carr*, 369 U. S. 186 (1962); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). This intervention, however, has never been enthusiastic. The Court has recognized that under our federal democratic system of government the direction of local governmental affairs should be left to as great an extent as possible to the elected rep-

resentatives of the majority. *United States* v. *Richardson*, 418 U. S. 166, 179, 188-191 (1974). Where the legitimate need for local governmental autonomy collides with the need to protect constitutional rights the just requirements of both can best be reconciled by the award of damages for the violation of the constitutional right itself. The state remains free to direct the conduct of its own affairs, the individual is compensated to the extent of the deprivation of his right and respect for the Constitution by citizen and official is maintained.

D. Nominal Damages Are an Inadequate Remedy for the Violation of Constitutional Rights Because They Provide Neither Redress for the Harm Inherent in the Deprivation of the Right Nor Deterrence Against Such Violations in the Future.

In recognition of both the probability that the District Court erred in dismissing Respondents' complaints without any relief whatever and that an award of one cent in damages is equivalent to a verdict in their favor, *supra* pp. 39-40, Petitioners argue that nominal damages are an appropriate remedy for the violation of Respondents' constitutional rights. Petitioners' Br. p. 16. Since nominal damages may be awarded only where the violation of the right causes no actual loss to the plaintiff, the adequacy of this remedy depends upon acceptance of Petitioners' contention that the bad faith violation of due process of law in the absence of proof of consequential injury is a deprivation of a mere technical entitlement having no substantive value of its own. This argument, however, as noted above, pp. 25-31, requires the Court to ignore the precise personal harms which procedural due process of law is intended to prevent. Moreover, acceptance of the Petitioner's and *Amicus*' assertion that the Bill of Rights' only ascertainable value is to be found in the consequential interests collaterally protected by the Rights, and not in the exercise of the Rights themselves, would represent a significant change in the role which courts have given to the Constitution as the paramount safeguard for the exercise of the fundamental

rights of American citizenship. It was to avoid the diminution of this role that Judge Tone warned in the Seventh Circuit's opinion below against damages so small as to trivialize the constitutional rights.[10] 545 F. 2d at 32. Since an award of damages for the violation of a right is inevitably the trier of fact's pronouncement of the worth of that right to the plaintiff, there is perhaps no more effective way to trivialize a constitutional right than to award one cent in damages for its violation.

Petitioners and *Amicus* also argue that any award of more than nominal damages for the violation of a constitutional right without proof of consequential injury would constitute a windfall profit for the plaintiff. The identity which Petitioners and *Amicus* see between windfall profits and general damages, however, disappears once it is conceded that a plaintiff loses something of value when he is deprived of the exercise of a constitutional right. The critical distinction obscured by Petitioners' windfall profits argument is that between nominal damages and small damages, which may not be much larger than nominal, but are still compensatory in nature. *Michael* v. *Curtis*, 60 Conn. 363, 22 A. 949 (1891); *Chapin* v. *Babcock*, 67 Conn. 255, 34 A. 1039 (1896).

For example, the injury suffered by a student whose due process rights are knowingly violated by virtue of a suspension

10. The same point was made in the above-cited passage from the decision of the Court of Appeals for the District of Columbia in *Tatum* v. *Morton*, *supra*, p. 20. In his concurring opinion in that case Judge Wilkey was even more explicit on the question:

> "Looking at the wrong done as a collective wrong, the total amount awarded against the defendant District of Columbia should be sufficiently sizeable to discourage repetition of such illegal police action in the future, without being of such horrendous size as to shock the public-taxpaying-conscience. The total amount should be sufficient, when divided among the twenty-seven plaintiffs, to give each an amount which will assure him that First Amendment rights are not lightly to be disregarded and that they can be truly vindicated in the courts." Slip Opinion, p. 4 of concurring opinion.

without a hearing would not necessarily be of the same magnitude as the injury inflicted by virtue of the violation of the due process rights of an accused criminal who is sentenced to prison without a trial. The arbitrariness of the defendant's conduct, the personal indignity inherent in the violation, the importance of the liberty or property interest jeopardized by the due process violation and the relative chance of avoiding the loss had the requisite opportunity for a hearing been afforded are all elements of the injury inherent in the deprivation of due process, *supra* pp. 25-31, which the trier of fact might consider in deciding to award smaller compensatory damages to the suspended student and larger compensatory damages to the prisoner sentenced without a trial.

Distinguishing between small deprivations warranting small damages and major deprivations warranting heavy damages is a task juries have traditionally been relied upon to accomplish, backed-up by the trial and appellate courts' supervisory authority to eliminate the effects of passion and prejudice and to assure that the law is followed. Cf. 1 F. Harper and F. James. *The Law of Torts*, § 5.29, 467 (1956); *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95 (1931); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 394-395 (1974) (White J. dissenting). Petitioners' and *Amicus'* windfall profits argument is especially weak on the record of the instant case in which there has thus far been no award of damages pursuant to the Seventh Circuit's opinion. Therefore, no factual basis exists for dismissing the credibility of the court's instructions to the trial court against awarding damages so large as to constitute a windfall.

Petitioners' and *Amicus'* second argument in favor of nominal damages posits that any larger award for constitutional violations will lessen peoples' willingness to accept employment by the government. Petitioner's Br. p. 18, *Amicus* Br. p. 47. No evidence is advanced to support this proposition which on its face seems unlikely. *Developments In The Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1223 (1977). For example,

the officials faced with liability in the instant case are Chicago public school principals. Even if Illinois law did not require their indemnification by the Chicago Board of Education, Ill. Rev. Stats. Ch. 122, § 34-18.1 (1976), it would be difficult to believe that these school principals would have been deterred from accepting their jobs, which pay over $30,000 a year, *School Budget*, 1976-77, Board of Education, City of Chicago, 1071, 1321, by the possibility of general compensatory damage verdicts against them for their potential bad faith violations of students' constitutional rights. A more important consideration, however, is that the person who would be deterred from accepting government employment because of the fear of being held legally accountable in damages for his bad faith violations of citizens' constitutional rights is not one whom courts should as a matter of judicial policy encourage to take public employment through the incentive of enhanced immunity from damages. Cf. *Developments In the Law—Section 1983 and Federalism*, 90 Harv., L. Rev. 1133, 1224-1225 (1977). Indeed, to limit to nominal damages public official liability for bad faith constitutional violations in order not to discourage people from becoming public officials would contradict Congress' primary purpose in enacting § 1983, which was to deter the use of official authority to violate constitutional rights, *supra* pp. 10-12.

Amicus, however, maintains that deterrence of illegal conduct is not a legitimate purpose of the remedy of general compensatory damages: "(public) school officials should not be subject to liability for damages which are punitive in effect without proof of actual malice." *Amicus* Br. p. 35 n. 12. To the contrary, the Court has long held that punishment for violations of law is a proper function of private damage actions in order to deter future violations. *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33, 42 (1916) ("Liability to a private suit is or may be as potent a deterrent as liability to public prosecution."); *S. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U. S. 388, 407-8 (1971) (Harlan, J. concurring). In light of the

above discussed legislative intent of § 1983, *supra* pp. 8-15, there can be no doubt that punishing civil rights violators in order to deter violations in the future is an integral function of damage awards under § 1983.

The Court in *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), and *Wood* v. *Strickland*, 420 U. S. 308 (1975), addressed at length the balance which should exist between the uninhibited performance of state governmental functions and the deterrence of and compensation for violations of constitutional rights. Instead of accepting the accommodation of those interests which the Court reached in *Wood* through limiting liability in damages to cases where officials knew or should have known they were violating constitutional rights, Petitioners would have the Court now exclude entirely from the scope of judicial redress violations of constitutional rights in cases where harm other than that inherent in the violation is not proven. The particular nature of the harm caused by a bad faith violation of constitutional rights, however, does not justify abandoning the good faith immunity standard of *Wood* in favor of the absolute immunity desired in this case by Petitioners. Moreover, *Amicus'* and *Petitioners' pro forma* warning of the disastrous consequences of allowing compensatory damages for the harms inherent in school officials' bad faith violations of constitutional rights, *Amicus* Br. p. 47, Petitioners' Br. p. 18, is even weaker than the argument rejected in *Wood* against allowing any compensatory damages for school officials' civil rights violations. *Amicus'* and Petitioners' failure to cite, and Respondents' failure to find after searching the case law, even one reported decision since *Wood* awarding students compensatory damages for school officials' bad faith constitutional violations reveals the lack of substance in their contention that boards of education will be crippled by constant oversized damage awards. Furthermore, such argument manifests a deep distrust not only of the common sense and intelligence of judges and juries, but also of the willingness of school officials to conform their conduct to the clear requirements of the Constitution. If

Petitioners' and *Amicus'* doubts about school officials in this regard are justified, however, there is even more reason to allow damages for the harm inherent in bad faith violations of constitutional rights in order to supply the extra incentive needed to insure good faith compliance with the Constitution.

It is not Respondents' position that should public officials no longer be deterred by the threat of compensatory damages for bad faith constitutional violations which are unlikely to result in provable consequential injuries, most of them would proceed to violate constitutional rights without regard for the high esteem in which our society holds the Constitution. Rather, it is asserted that removing the possibility for meaningful judicial redress for the injury inherent in the violation of constitutional rights will permanently alter and diminish the role of the judicial branch of government in safeguarding constitutional rights. Neither in recent nor more remote times does American history give any indication that the legislative and administrative branches of government are in themselves adequate to guarantee the enforcement of constitutional rights. *E.g.*, *United States* v. *United States District Court*, 407 U. S. 297, 316-317 (1972); *Monroe* v. *Pape*, 365 U. S. 167 (1961); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Ex Parte Milligan*, 71 U. S. (4 Wall.) 2 (1866). It is true that under certain narrow circumstances courts may declare what the Constitution states and may enjoin its future violation. However, unless courts have the ability to award damages for past bad faith violations of the Constitution, victims can have no redress, violators cannot be deterred and the "promise of § 1983" can only be a hollow one.

VI. The District Court's Denial of Damages Because of Respondents' Failure to Quantify Their Damages Was Based Upon an Erroneous Legal Standard and Was Therefore Properly Reversed by the Holding of the Seventh Circuit.

Should the Court find that neither the legislative intent under § 1983 nor common law damage principles justify an

award of general compensatory damages for the harm inherent in the deprivation of constitutional rights, the District Court's denial of damages was still properly reversed because it applied an erroneous legal standard. In assuming that a prerequisite for awarding Respondents damages was "evidence in the record to quantify their damages," Memo. Opinion, A10, the District Court applied a measure of damages that is appropriate for cases where the claimed loss is money or is directly measurable in monetary terms, such as the value of goods or services. The requirement of affirmative evidence to quantify damages is the normal rule for breach of contract cases, which, as the District Court's reliance on two such cases reveals, *Hoefferle Truck Sales Inc.* v. *Divco-Wayne Corp.*, 523 F. 2d 543 (7th Cir. 1975), and *Classic Bowl, Inc.* v. *AMF Pinspotters, Inc.*, 403 F. 2d 463 (7th Cir. 1968), provided the basis for its ruling below. Memo. Opinion, A10.

However, treatise writers,[11] the Restatement of Torts[12] and

11. "A fairly large number of torts, statutory and common law, are concerned principally with invasions of intangible interests rather than with invasions of physical or economic interests. . . . In this class of cases, damages are 'presumed,' or the wrong is said to be damage in and of itself. This includes such claims as those for assault, battery, false imprisonment, malicious prosecution, intentional infliction of mental distress, some kinds of invasion of privacy, alienation of affections and the like, intentional interference with voting and other electoral rights, and for invasion of analogous civil rights provided by statute." Dobbs, *Handbook on The Law of Remedies.* 528-529 (1973) (footnotes omitted); "In addition to proving the fact of loss, the plaintiff must ordinarily prove, so far as it is susceptible of proof, the extent, that is, the equivalent in money, of his loss or injury. This is applicable, of course, to cases of loss or damage to goods or land and to injuries to interests of substance generally, but is as obviously inapplicable to nonpecuniary damage, such as pain, humiliation, or mental suffering." McCormick, *Handbook on the Law of Damages,* 54-55 (1935) (footnotes omitted).

12. "For harms to body, feelings and reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of the amount other than evidence of the nature of the harm. . . . The discretion of the judge

(Footnote continued on next page.)

judicial opinions[13] are in accord that where the claimed injuries are non-pecuniary in nature, and concern intangible harms, such as those to feelings, reputation, personal dignity, privacy or liberty, the injuries are compensable without proof of the extent of the harm "since the existence of the harm may be assumed and its extent is inferred as a matter of common knowledge from the existence of the injury as described." Restatement of Torts, § 904, comment a at 542 (1939). Without a rule of general damages in such cases compensation for the harm suffered would be impossible, as the Iowa Supreme Court pointed out in a false imprisonment case:

> "In the very nature of things, it is not possible for the injured party to open up his mental and emotional experiences in such manner that the jury may examine them as they would examine a map or chart, or may compute and measure his compensation as they would compute the sum due on a promissory note; but, the facts and circumstances of the alleged wrong being given, the jury must be per-

(Footnote continued from preceding page.)

or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation." Restatement of Torts, § 912, comment b at 575-576 (1939).

13. *Page* v. *Mitchell,* 13 Mich. 63, 68 (1864) (in action for false imprisonment court reversed award for nominal damages: "The court can never confine a jury to either nominal or special damages, if there has been a real personal injury; and every deprivation of liberty is so regarded. It is for the jury themselves to determine whether the circumstances should reduce the recovery to a minimum.") *Oliver* v. *Kessler,* 95 S. W. 2d 1226, 1229 (Ct. App. St. Louis, Mo. 1936) ("General damages follow as a matter of course from the mere showing of his wrongful arrest and imprisonment.") *Morrison* v. *Lawrence,* 181 Mass. 127, 130 (1902) (Where a child is excluded from school without a prior hearing, the finder of fact ". . . may consider any indignity or disgrace which follows from the public exclusion of a boy from school."); see also *Manger* v. *Kree Institute of Electrolysis,* 233 F. 2d 5, 9 (2nd Cir. 1956); *Fairfield* v. *American Photocopy Equipment Co.,* 138 Cal. App. 2d 82, 291 P. 2d 194 (1955); *Ross* v. *Leggett,* 61 Mich. 445, 28 N. W. 695, 699 (1886); *Lake Erie & Western R. R. Co.* v. *Christison,* 39 Ill. App. 495 (1891).

mitted to take them, and therefrom to fix the compensation which they, as fair-minded men, may believe to be just and reasonable." *Young* v. *Gormley*, 120 Ia. 372, 94 N. W. 922, 924 (1903).

That civil rights violations commonly result in harms of an intangible non-pecuniary nature is clear from numerous court opinions[14] and is accepted by both Petitioners, Petitioners' Br. p. 16, and *Amicus*, who states that in the context of the denial of student's constitutional right to due process "(a)ctual injury could encompass such elements as emotional and mental distress, humiliation and loss of reputation, as well as out-of-pocket and consequential pecuniary losses." *Amicus* Br. p. 24, n. 9. Given this intangible, nonpecuniary nature of the harms resulting from constitutional violations in general and due process violations in particular, the district court erred in applying a standard for the measurement of damages that does not allow general damages to be presumed from the circumstances of the violation and in requiring instead that Respondents adduce quantifiable evidence of the extent of their injuries.

Although technically the District Court's finding of no damages may be classified as a finding of fact, it is not subject to the "clearly erroneous" standard of review of Rule 52a of the Federal Rules of Civil Procedure since the finding was based on an improper legal standard and is reversible for that reason alone. *U. S.* v. *Singer Mfg. Co.*, 374 U. S. 174, 193 (1963); *U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29, 43-44 (1960); *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, 412 F. 2d 1011, 1042 (5th Cir. 1969).

14. *Seaton* v. *Sky Realty Company, Inc.*, 491 F. 2d 634, 637-8 (7th Cir. 1974) (In affirming a $500 compensatory damage award for racial discrimination in sale of housing in violation of 42 U. S. C. § 1982 and § 3604 the court stated, after having reviewed the case law: "We are satisfied that under decided federal cases among the circuits, compensatory damages may be awarded for the humiliation suffered by plaintiffs, whether inferred from the circumstances or established by testimony, and that $500 is well within, the range of reasonable amounts."); *Donovan* v. *Reinbold*, 433 F. 2d 738, 743 (9th Cir. 1970).

CONCLUSION.

For the reasons set forth above, Respondents Piphus and Brisco respectfully request that the decision of the Seventh Circuit Court of Appeals be affirmed.

Respectfully submitted,

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Dated: August 31, 1977.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

PUSH, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants,

JARIUS PIPHUS, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants.

Nos. 73 C 2522 and 74 C 303 Consolidated.

MEMORANDUM OPINION AND ORDER

These consolidated cases are civil rights actions challenging the constitutionality of rules and procedures used by the Board of Education of the City of Chicago (the Board) in suspending elementary and high school students from its schools. The cases have been submitted to the Court for final adjudication on stipulated records which include certain depositions, documents, factual stipulations, and affidavits. This opinion will constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Plaintiffs in No. 73 C 2522 are Silas Brisco, a student; his mother, Catherine Brisco, and People United to Save Humanity

(PUSH), a not-for-profit Illinois corporation primarily composed of minority group members.[1] Plaintiffs in No. 74 C 303 are Jarius Piphus, a student; and his mother, Geneva Piphus. Defendants in each action are members of the Board or agents of the Board who allegedly participated in the suspensions in question or who knew or reasonably should have known that unconstitutional suspensions would occur.

During the 1972-73 school year, Silas Brisco was enrolled in the fifth grade at Clara Barton Elementary School which is located on the southside of the City of Chicago. During this period the Barton School was in transition from a predominantly white to a predominantly black enrollment. Also during the 1972-73 school year, several black male students began to attend school wearing earrings. The principal and other school administrators believed that these earrings denoted gang membership and thus a decision was made that in the interest of student safety male students would be prohibited from wearing earrings. The district superintendent with jurisdiction over the Barton School, Steven Brown, was notified of this decision and approved of the prohibition.

Subsequent to the establishment of the earring rule, certain male students were orally informed of the existence of the earring rule and were warned that further wearing of an earring could result in a suspension. There were no other published rules in effect at the Barton School at the time the earring prohibition was adopted nor was the earring rule reduced to written form. Silas Brisco, however, had actual notice of the earring ban.

1. Defendants have challenged the standing of PUSH to be a party plaintiff in 73 C 2522. In a memorandum opinion dated June 13, 1974, this Court held that PUSH alleged facts entitling it to standing. Since then PUSH has filed an uncontroverted evidentiary affidavit which factually supports the allegations contained in the second amended complaint. PUSH therefore has established as a factual matter that it or its members have experienced specific injury in fact and come within the zone of interests to be protected. Its standing to sue has therefore been established. *Warth* v. *Seldin*, 95 S. Ct. 2197 (1975).

Starting in May 1973, Silas Brisco began to wear an earring to school in contravention of the rule. On one occasion in May 1973, he was told to remove the earring or face suspension. At that time he refused and was suspended for a portion of the school day until his mother conferred with District Superintendent Brown; Brisco then removed the earring and was readmitted.

When school reconvened in the fall of 1973, the earring problem reoccurred. On September 11, 1973, Brisco again wore an earring to school. During the course of the day he was called to the school office by the principal, Rudolph Jezek, and Gordon Sharp, assistant principal. They ordered Silas to remove the earring in question. Silas refused, asserting that wearing earrings did not denote gang membership, but rather was a symbol of black pride.

Following his refusal to remove the earring, Principal Jezek conferred with District Superintendent Brown, Brown informed Jezek that the earring ban was still in effect. Brisco was then informed that unless he immediately complied with the rule, he would be suspended. He continued to refuse to remove the earring.

Assistant Principal Sharp then left the immediate central office area to telephone Brisco's mother and write up a suspension report form. Mrs. Brisco then came to Barton School where a conference was held with Jezek and Sharp. Jezek informed Mrs. Brisco of the impending suspension if Silas did not comply with the earring rule. Mrs. Brisco supported her son's behavior and thus a 20-day suspension was imposed. Ultimately, Brisco served 17 days of the suspension; he was voluntarily readmitted while a motion for preliminary injunction was pending before this Court. In sum, at no time before or after Silas' suspension did an independent observer hear evidence with respect to the factual issue of what the wearing of an earring actually denoted.

The facts surrounding the suspension of Jarius Piphus are equally straightforward. During the 1973-74 school year he was

a student at Chicago Vocational High School (CVS). The rules of CVS prevented cigarette smoking and bringing intoxicating substances onto school property. Jarius had actual notice of these rules. On January 13, 1974 defendant Reginald Brown, principal of CVS, observed plaintiff and another student passing an irregularly shaped cigarette between them. At that time Piphus was on school property, near the school parking lot. As Brown approached Piphus, he smelled smoke which he believed to be the odor of marijuana. Mr. Brown also observed Piphus attempting to pass cigarette papers to the other student. Cigarette papers can be used for preparing marijuana cigarettes. When the boys saw Mr. Brown they discarded the cigarette. The object may have been thrown into nearby hedges or discarded on the way to the school office. No attempt was made to recover the object although Piphus has consistently denied that he was smoking marijuana.

Despite the denial, Mr. Brown accompanied Piphus and the other student to the school's disciplinary office and there told the assistant principal to follow the "usual procedure" imposing a 20-day suspension for violation of the rule against smoking marijuana. Piphus was then formally suspended by the assistant principal, although Principal Brown admits that it was his decision to suspend him.

Subsequently, two meetings were held between school officials, Piphus, his mother, sister, and legal representatives from the Mandel Legal Aid Clinic. These meetings were not fact finding hearings but rather were for the purpose of explaining actions previously taken. At the second of these meetings, the Mandel representatives were excluded when they attempted to tape-record the proceedings. Thereafter, Piphus' suspension was reduced to five days by the District Superintendent. At the same time, Judge Bauer entered a temporary restraining order readmitting plaintiff. As a result of the incident in question, Piphus missed eight days of classes.

Two legal issues have been raised by the above-described suspensions: (1) whether students were given sufficient prior notice of conduct which was prohibited, and (2) whether adequate hearings were held at the time Brisco and Piphus were suspended.

At the time of the incidents in question the Board rule governing suspensions read as follows:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Each such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil." Rule 6-9 of the Rules of the Board of Education of the City of Chicago (1973).

Plaintiff's argue that the language "gross disobedience or misconduct" is unconstitutionally broad and vague, particular in an arguably First Amendment context such as the Brisco case. Were the "gross disobedience or misconduct" language the sole notice given to forewarn a student of forbidden conduct, the Court would agree with plaintiffs. See *Soglin* v. *Kauffman*, 418 F. 2d 163 (7th Cir. 1969); *Linwood* v. *City of Peoria*, 463 F. 2d 763 (7th Cir. 1972). However, both students here were given actual notice of reasonably narrow regulations which gave specific meaning to the terms in dispute. *Linwood* demonstrates that this type of procedure is constitutionally sufficient. In *Linwood* the court stated the language "gross disobedience or misconduct"—

> "does not purport to define or proscribe specific acts or omissions which may be penalized by suspension or expulsion. But it does furnish the local school authority with a general guideline or standard—that student disobedience or misconduct must be 'gross' to justify its being made a ground for suspension or expulsion." 463 F. 2d at 768.

Thus, the gross disobedience language was not intended to be a self-executing regulation of student conduct but rather was intended to be a generalized grant of power exercised by instituting more specific regulations. Here such specific regulations were promulgated by the individual schools involved, providing adequate actual notice of forbidden conduct.[2]

Plaintiffs also argue that Brisco and Piphus were not accorded sufficient hearings to test the evidentiary basis for their suspensions. In *Goss* v. *Lopez*, 95 S. Ct. 729 (1975), the Supreme Court held that students who were temporarily suspended from publicly supported schools were entitled to hearings which comport with minimal requirements of due process (an informal hearing).[3] Unless the student's presence poses a continuing

2. Plaintiffs properly note that the Board has failed to issue one generalized set of specific narrowing regulations, nor has the Board required each school to issue appropriate regulations. As a consequence, some schools have no such formal regulations while other schools promulgate regulations on an *ad hoc* or word-of-mouth basis, while yet other schools have a quite formal set of written regulations. Despite this range of behavior, the Court has not been presented with any evidence of specific suspensions of students from schools without any narrowing regulations. Because educational discipline presents problems not easily resolved by constitutional judicial inquiry, until such a case is presented in a complete factual context, this Court expresses no view as to what type of remedy would be appropriate in such a case.

3. After *Goss* was decided the Board revised its suspension practices. Rule 6-9 now reads:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding . . . ten school days for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil.
>
> "Prior to a suspension of 10 days or less the student shall be given oral or written notice of the charges against him and an informal hearing with an explanation of the basis of the charge and an opportunity to explain his version of the facts. Students whose presence poses a continuing danger to persons

(Footnote continued on next page.)

danger to persons or property or an ongoing threat of disrupting the academic process, the hearing should be held before a suspension is imposed. The Court also stated that suspensions in excess of 10 days, expulsions, or unusual circumstances may warrant more formal hearings. Here both suspensions potentially

(Footnote continued from preceding page.)

> or propery or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and informal hearing should follow as soon as practicable."

The following guidelines were also adopted:

> "1. No student shall be suspended from school without using the authorized procedures. Every suspension shall be reported immediately to the District Superintendent using the appropriate forms and also reported to the parent or guardian of the pupil with a full statement of the reasons for the suspension.
>
> "2. A student facing suspension of ten days or less shall be given oral or written notice of the charges against him and an informal hearing arranged by the principal. At the hearing, the student will be given an explanation of the basis of the charges as well as an opportunity to present his version of the facts.
>
> "3. A student facing suspension may request that a third party—such as a parent, school staff member or another student be present during the informal hearing.
>
> "4. In those cases where a student's presence poses a continuous danger to persons or property or is an ongoing threat of disrupting the academic process, the student may be immediately removed from school. In such cases the necessary notice and informal hearing should follow as soon as practicable.
>
> "5. Every effort should be made to ensure the student's receipt of class assignments for the period of the suspension. The academic grade of a suspended student will not be affected when class assignments are completed satisfactorily in keeping with standards applicable to all students set by the students' teacher. Teachers have the further option of testing pupils upon their return to class on the work submitted."

For the reasons stated in footnote 2, the Court believes that the constitutionality of these new regulations cannot be tested until a full factual background is developed. Moreover, the parties have failed to demonstrate that a true case or controversy presently exists with respect to these rules. This Court therefore should not render an essentially advisory opinion on the constitutionality of the rules.

exceeded 10 days, triggering the need for more formal procedures. Additionally, the first amendment implication of the Brisco case also warrants stricter procedural standards before a suspension can be imposed. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969).

This Court's prior opinion in *Quintanialla* v. *Carey*, 75 C 829 (N. D. Ill. March 31, 1975) sets out the basic contours of a formal school disciplinary hearing:

> (1) the student should be given a prehearing notice of the specific charges against him, including a short summary of the evidence the school administrator intends to rely upon;
>
> (2) the student should have the right to be represented by counsel (or another responsible advocate) at the hearing;
>
> (3) the student should be able to present witnesses on his behalf and cross-examine witnesses;
>
> (4) the student, at his expense, should be able to make a tape recording or transcript of the hearing;
>
> (5) an impartial hearing officer should preside generally. This would preclude a witness from serving as the hearing officer and, in some instances, a school administrator not from the same school as the accused student would be necesary.

See also *Mills* v. *Board of Education of Dist. of Columbia*, 348 F. Supp. 866, 880-84 (D. D. C. 1972); *Vail* v. *Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592, 603-604 (D. N. H. 1973).

Measured against these generalized requirements it is apparent that both Brisco and Piphus failed to receive adequate disciplinary hearings. The decisions to suspend both of them were made by their major factual accusers. Neither was afforded an opportunity to present evidence in his behalf at a meaningful

time and in a meaningful manner. Any conferences with respect to the suspensions in question were held after an administrative decision had already been made. Piphus' attorneys were excluded from his post-suspension conference and he was not permitted to make a tape recording of the conference.

Since plaintiffs have established that unconstitutional suspensions occurred, we must consider the form of relief to be provided. Undoubtedly plaintiffs are entitled to a declaration that the suspensions in question were unconstitutional. Plaintiffs' school records should be corrected, deleting any reference to these suspensions. Plaintiffs have also asked for an award of actual and punitive money damages. A recent Supreme Court and several recent Seventh Circuit opinions set forth the standard for measuring whether monetary liability is appropriate. *Wood* v. *Strickland*, 95 S. Ct. 992 (1975); *Minns* v. *Board of Education*, No. 74-1534 (7th Cir. Sept. 24, 1975); *Hostrop* v. *Board of Junior College Dist. No. 515*, No. 74-1915 (7th Cir. Sept. 24, 1975). An official is immune by reason of good faith for liability for damages for a constitutional violation if he is:

> "acting, not with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff], but 'sincerely and with a belief that he is doing right.' Second, if he meets the first test, he is liable only 'if he knew or reasonably should have known' that his act 'would violate the constitutional rights of the plaintiff' " *Hostrop, supra*, Slip Op. p. 10, quoting *Wood, supra*, 95 S. Ct. at 1001.

Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly defendants believed that they were protecting the integrity of the educational process. With respect to the second element of the *Wood* test, it is appatent that shorter suspensions as contemplated by *Goss* might raise the defense that defendants are not "charged with predicting the future course of constitutional law" and thus cannot be

held responsible for the legal developments anticipated in *Goss*. The initial length of suspensions imposed in the instant case seems to indicate, however, that under the *Linwood* rationale, defendants should have known that plaintiffs were entitled to some type of adjudicative hearing. The potential 20-day length of the suspensions was more analogous to an expulsion than a *Goss*-type suspension. Defendants should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs. Technically, therefore, plaintiffs should be entitled to damages.

However, damages must be proved with at least a reasonable degree of certainty. *Hoefferle Truck Sales Inc.* v. *Divco-Wayne Corp.*, 74-1481 (7th Cir. Oct. 6, 1975); *Classic Bowl, Inc.* v. *AMF Pinspotters, Inc.*, 403 F. 2d 463 (7th Cir. 1968). Plaintiffs put no evidence in the record to quantify their damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof. Accordingly, the complaints are dismissed.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. MCLAREN,
United States District Judge.

Dated: November 5, 1975.